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No. [redacted] 3

In the Supreme Court of the United States

October Term, 1939

[redacted]

NORTHERN PACIFIC RAILWAY COMPANY, [redacted]
PACIFIC RAILROAD COMPANY, ET AL., APPELLEES

[redacted] THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION

[redacted] FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 476

UNITED STATES OF AMERICA, APPELLANT

v.

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, ET AL., APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF FOR THE UNITED STATES

In this reply to the company's brief filed February 26, 1940, which will be cited as "N. P. Br.," the order of discussion will follow the order of the fifteen points in the brief filed for the United States February 10, 1940, which will be cited as "U. S. Br."

Before entering upon a specific discussion of these several points it is deemed appropriate to notice that throughout the company's brief there are numerous erroneous statements of fact—some

unsupported by the record, others contrary to the record, and some even differing from the allegations of fact made in subdivisions of the complaint stricken out on the company's application which, of course, are to be taken as true for the purposes of this appeal.

The more significant of these errors will be pointed out in connection with the discussion of the points to which they relate. Others are not thought to have sufficient bearing on the points for argument to require specific discussion. However, mere failure to contradict them in this reply is not to be deemed a concession of their correctness.

Several examples will sufficiently illustrate the general tendency of the emphasis which is apparent upon close study of the company's brief.

Four times in as many pages (N. P. Br. 135–139) it is stated that the United States agrees that there were deficiencies. Not only has the United States not so agreed but, on the contrary, it has denied that there were deficiencies and has asserted that position in the district court and in its brief in this Court.

In the general statement (N. P. Br. 9) the company says: "It has faithfully discharged every obligation imposed by the Act of July 2, 1864." Yet it is patently evident from the record that the company has failed substantially and essentially to complete the whole road required by that act.

The brief says (N. P. Br. 10): "Withdrawals from second indemnity limits of the 1870 grant

were 213,001.66 acres." It omits to state that the court found that there were no second indemnity limits and that the limits referred to had been erroneously laid down (R. 617 (j)).

In discussing the question of the correctness of the order striking out certain subdivisions of the complaint on demurrer, the brief (N. P. Br. 22) denies the allegations of the stricken subdivisions and substitutes, as a basis for the discussion, the allegations in the company's answer thereto. Obviously these are irrelevant to such a discussion.

Perhaps the most interesting example of the brief's treatment of the facts, although not the most significant to the issues involved, is the statement (N. P. Br. 29) that "The historic date of completion of the line is September 8, 1883, when the golden spike was driven in Montana in the presence of President Grant and a distinguished company of native and foreign guests." This description of a dramatic formal ceremony no doubt is designed to suggest a genuine completion of the road and its acceptance by the President of the United States as a completed railroad. Whatever may be its purpose the statement has a certain delusiveness. At the time of the ceremony the Northern Pacific Railroad had not in fact been completed west of Pasco and Wallula in eastern Washington. Nor was the President of the United States present at the ceremony. President Grant's second term had ended six years before, in 1877, and when the golden spike was driven

not only was he a private citizen, but he was one of the corporators of the Northern Pacific Railroad Company (App. 36, line 1). Whatever significance the ceremony may have had, obviously it has no bearing on any question presented on this appeal.

Other errors in statement of the facts before this Court are discussed hereafter.

1. The fraudulent mineral classification

References: U. S. Br. 46–58; N. P. Br. 59–86.

The appellees' brief attempts no real answer to the contention of the United States that the company cannot, in law or in equity, base indemnity selection rights on mineral losses in the absence of any attempt to show, except by the fraudulent classification, that there were such losses. It evades that encounter by discussing matters having no bearing on the court's error in striking out (R. 412) the subdivision alleging this fraud.

The brief asserts in substance that the allegations of the subdivision are not true (N. P. Br. 68). Manifestly, the question whether the court erred in striking out the subdivision must be determined on the assumption that its allegations are true. If they were legally material, the United States should have been given an opportunity to prove them.

The brief says that the subdivision "does not allege that any of those lands were improperly

classified" (N. P. Br. 68). To the contrary, the subdivision alleges facts which establish that they were all improperly classified; that the classification of 3,782,377.90 acres as mineral was only a pretended classification (R. 61) and that it was false and untrue in that the classifications were not made with reference to the mineral or nonmineral character of the lands but with reference only to the value of the lands, so that if they were of high value they were classified as nonmineral without reference to their mineral character, and, if they were of low value, as mineral, likewise without reference to their actual character (R. 62–63). It alleges that the company "well knew that the said classification reports made as aforesaid by the said commissioners were fraudulent, deceitful, false, and untrue." (R. 63.) This is what the appellees' brief asserts is not an allegation that any of the lands were improperly classified. Plainly it is such an allegation.

The brief states (N. P. Br. 69) that the United States makes no point that the allegations of subdivision XXVIII give rise to the so-called "clean hands" doctrine. The brief for the United States makes it clear that the United States insists upon that contention as well as others, and has merely pointed out that the purpose of the subdivision is not limited to the assertion of that doctrine (U. S. Br. 52, 48–58).

The brief states that the company is asking no relief (N. P. Br. 70). But it is plain from the

record that the company does seek relief. prays (R. 248): "* * * that the court dete mine the compensation due to the Northern Paci Railway Company for the lands expropriated l the United States by the Act of June 25, 1929, ar enter its decree in favor of this defendant for th sum so found." The company has never disclaime this prayer for relief. It constituted a counte claim based on many allegations (R. 154–248). could acquire no surer quality as a counterclaim b prefacing it with the title of counterclaim.

The brief states that "By the Government's pres ent contention it has in the forest reserves 2,894, 823.24 acres of place lands to which it has not a pretext of right" (N. P. Br. 72). The Unite States makes no contention that place lands in th forest reserves have been forfeited. The Act o June 25, 1929, did not forfeit such lands. It ap plied only to lands "within the indemnity limits" (App. 148–149) and the forfeiture was of "indem nity selection rights, if any" (App. 149). Th company's rights to place lands which were in fac nonmineral did not depend upon the issuance o patents. If it ever became entitled to nonminera place lands it did so when a plat of definite locatio of the road had been filed (App. 40–41). If it eve acquired such a right, the United States has neve purported to take the right away. Furthermore these assertions of the appellees' brief have n place in an argument as to the demurrability o

subdivision XXVIII. That subdivision makes no allegations to which such contentions may apply.

The brief unwarrantably asserts a shift of position by the Government (N. P. Br. 70). This disregards the language of the subdivision itself which concludes by averring that by reason of its allegations the company and its predecessor "are not entitled to any additional lands or money from the United States by reason of the classification made under the Act of February 26, 1895" (R. 65).

The brief asserts that the classification procured by the company's fraud is conclusive, apparently in favor of the defrauding party, until set aside (N. P. Br. 70). No argument or authority is offered in support of this assertion. It is submitted that it is without merit. The terms of the statute leave the fraudulent classification without effectiveness. (U. S. Br. 50, 48–58.) In making this argument, the company ignores both the language and the effect of the classification act. By that act, after the classification was completed, no patents were to issue for any lands which the commissioners had classified as mineral (App. 95). The classification was to be made within four years and was to be made by commissioners, subject only to formal approval by the Secretary of the Interior (App. 95–96). No practical scope was left for the exercise of judgment by the Secretary as to the mineral or nonmineral character of the lands so

classified except in case of a protest and an appeal (R, 99). Under the terms of the statute the unprotested classifications made by the commissioners were expressly denied finality in case of fraud (App. 100). The company, having procured a fraudulent classification, cannot rely upon that classification to support a claim of right to make indemnity selections based on place lands not shown to be mineral (U. S. Br. 48–58).

But one classification was ever made—the one alleged to be false and fraudulent. No proceeding for rescission or for reclassification could nullify it more effectively than did the fraud alleged in the stricken subdivision. If there are other remedies than the assertion of the fraud as a defense to the company's claim their existence cannot alter the undeniable principle that the company may not maintain the right to make indemnity selections on the basis of a false classification of place lands which was merely a pretense and which was procured by its own fraud. The stricken subdivision alleges the fraud which vitiates that classification. The sole question on this point is whether the United States was entitled to prove those allegations. No amount of collateral argument can divert the issue from that question.

Appellees' brief asserts also that the Government is estopped by its delay and has waived the "pretended fraud" and ratified the classification (N. P. Br. 74). No basis for estoppel against alleg-

ing the actual fraud is apparent from the allegations of subdivision XXVIII and consequently no question of estoppel is presented by this appeal from the order striking that subdivision. There is no evidence of estoppel which is properly subject to review in this proceeding. When the subdivision was stricken, the issue of estoppel on this point was eliminated.

On the facts alleged in subdivision XXVIII the master was of opinion that the plea should not be sustained "until a full investigation can be had of the charges" (R. 344). It has never been heard fully. No conclusion as to the facts has been reached, either by the master or by the court (R. 344, 411, 412). The order striking out the subdivision is based not on findings of fact but exclusively on demurrer (R. 349). At a later time the court made clear that it did not adopt the master's findings of fact (R. 592), but that the basis for the decree was such findings as the court itself made (R. 788, lines 16–32). It follows that none of the facts claimed by the appellees' brief to constitute an estoppel on this point are before this Court. This the appellees recognize (N. P. Br. 77), but nevertheless the brief proceeds to argue the point on an asserted state of facts as to which the district court, by striking out the subdivision, declined to hear the evidence of the United States. The extensive argument in the appellees' brief is based on assertions, many of which differ from what it is

believed would prove to be the facts if the questions had been opened for trial. The matter cannot be reviewed on the basis of these unproved assertions.

It is noteworthy, however, that the company nowhere asserts that any official of the United States ever had reason to believe, prior to the hearings before the joint committee of Congress, that the company had been guilty of the fraud alleged in the stricken subdivision.

Moreover, nothing has been done or, in the circumstances, could have been done by the United States to ratify the fraudulent classification. The inclusion in the forest reserves of the lands here in question occurred, with slight exceptions, between March 1898 and March 1907. Thereafter the United States had no occasion to do anything about indemnity selections from these lands, based on mineral losses. The company knew of the fraud from 1895 or soon thereafter, but there is no suggestion that fraud on the part of the company was known to any official of the United States for years thereafter. Even if it had any place in this proceeding, the argument that the United States, ignorant of the fraud, is estopped to allege it against a company, at all times fully aware of it, would answer itself.

Even if the United States had known that this classification had been procured by the company's fraud, no more was required to be done by the United States with respect to the matters now be-

fore the Court on this appeal than was done. Although at the time it was ignorant of the existence of the company's fraud, the United States refrained from recognizing any right of the company to make indemnity selections in the government reserves based on this fraudulent classification (U. S. Br. 52, 48–58). It could have done no more than that had it known of the fraud.

Finally, the quotations relied upon in the company's brief itself show the falsity and worthlessness of the pretended classifications as a basis for any finding that the place lands, upon the actual mineral character of which the company's claims must rest, were in fact mineral. The report which the appellees' brief sets out (N. P. Br. 78–79) says that immense bodies of land now classified as mineral would have to be, under the terms of the act, classified as nonmineral for the simple reason that there are not now any known deposits of mineral thereon. Yet, the company's claim for compensation for loss of claimed indemnity rights rests, and must rest, solely upon a showing that these nonmineral lands, treated as mineral in a classification procured by the company's own fraud, were in fact mineral. The appellees' brief substantially concedes that they are not.

It is submitted that the company's brief not only contains nothing to justify the action of the court in sustaining the company's demurrer and in striking out subdivision XXVIII (R. 349) but on the

contrary confirms the lack of any basis for any right to compensation for loss of selection rights based on mineral losses in the place limits.

2. The nullity of the Act of July 2, 1864

References: U. S. Br. 59–66; N. P. Br. 16–23.

The appellees' brief appears to confess, tacitly, that on the allegations of subdivision VI of the complaint the Act of July 2, 1864, became a nullity on July 3, 1866, and has never been reenacted, and that no right existed thereafter to make indemnity selections. The appellees' contention is merely that this Court may not give effect to these facts because (a) the point is not open on this appeal, (b) irregularities of corporate organization were waived, and (c) the due corporate organization and construction of the railroad and right to the lands are *res judicata*. These arguments strike wide of the contention made by the United States.

(a) *The point is open on this appeal*

The statute governing this appeal (U. S. Br. 3–4) relates to this case only. The matters to be reviewed by this Court include: (1) the decree of June 27, 1939 (R. 642), and (2) the order of October 3, 1935 (R. 412).

The decree included the granting of the company's prayer (R. 248) for compensation for loss of alleged selection rights which, in turn, rested necessarily on the continued existence of the Act

of July 2, 1864. The order of October 3, 1935, struck out subdivision VI, which alleged facts showing that the act had become void (R. 412). The order was based on an adoption of the master's report (R. 411). The appellees' brief says that the master's report sustained the demurrer to this subdivision (N. P. Br. 17). Manifestly, any error in sustaining the demurrer is an error apparent on the face of the record and the subject of review on this appeal.

The United States excepted to the first order as to this point which was adverse to its position, that adopting the master's report and dismissing subdivision VI (R. 414, pars. (28) and (31)).

The nearest approach to an indication on the master's part of any thought which might have forecast the subsequent striking out of subdivision VI is the statement (R. 297): "The Government could not be heard thereafter to dispute the due and regular organization of the railroad company and its *de jure* existence under its charter * * *." That statement called for no exception, for it formed no basis for the striking of the subdivision. The corporation's existence is a question distinct from its right under the statute to receive public lands of the United States. The appellees' brief says (N. P. Br. 16): "The Government argues that the Northern Pacific ceased to exist on July 3, 1866." Clearly the United States does not make that contention (U. S. Br. 60). The complaint itself

had alleged that the Northern Pacific Railroad Company was a corporation existing under the Act of July 2, 1864 (R. 2). On the other hand, subdivision VI (R. 8) had set up facts showing that the act upon which rested the company's right to make indemnity selections had become null and void (R. 81). This position of the United States was not affected by the master's statement as to the *de jure* existence of the corporation (R. 297). The injury done the United States was not by the master's statement that the existence of the corporation could not be questioned. It had not been questioned. The injury was done by the order of October 3, 1935 (R. 412), striking out the allegations which established that the corporation's right to select indemnity lands had expired, regardless of its persistence as a corporation. The Appeal Act provides for review of this injurious order by this Court (U. S. Br. 3).

The full and timely objection of the United States to the ruling striking the defense asserted on this ground was on the record when the Appeal Act was enacted. Moreover, the United States, aggrieved by the order (R. 412) striking out this defense to the company's claim, continued to persist in the objection. After the filing of the master's second report, the United States excepted to the allowance of any compensation to the company because "(c) matters and facts alleged in plaintiff's amended bill of complaint show that the

company is not entitled in law or in equity to compensation for any of such withdrawn lands" (R. 576).

The requirement of exceptions is not intended to provide pitfalls for the unwary but merely to bring to the attention of the court the contentions to be made by the aggrieved party. Before the final decree in this case the new rules had dispensed with the need of exceptions (Rules of Civil Procedure, Rule 46). These rules apply to the pending case (Rule 86). And even before the new rules were adopted, this Court had said: "* * * an exception is not necessary to open for our consideration a question of law apparent on the record, as it is here, where there is nothing in the record to indicate waiver of the respondent's rights." *United States* v. *LaFranca,* 282 U. S. 568, 570. The insistence by the United States that the nullity of the Act of July 2, 1864, prevented any recovery of compensation by the company has been persistent. There has been no indication that the point has been waived. It is fundamental in the suit. In the assignment of errors the United States has asserted that the court erred: "53. In holding any withdrawal by the government in the indemnity limits invalid." "54. In holding that the railroad is entitled to compensation for or on account of any indemnity lands involved in the suit" (R. 658). The contention is included also in assignments 25 and 26 (R. 654, 655).

If there is merit in the contention of the United States that the Act of July 2, 1864, became a nullity on July 3, 1866, because of the facts alleged in subdivision VI of the complaint, it is unthinkable that this Court would not review the error plainly apparent on the record even if it had not been assigned. As this Court said in *Mahler* v. *Eby*, 264 U. S. 32, 45: "* * * we may under our rules notice a plain and serious error though unassigned. Rules 21, § 4, and 35, § 1, 222 U. S., Appendix, pp. 27, 37." *Wiborg* v. *United States*, 163 U. S. 632, 658; *Clyatt* v. *United States*, 197 U. S. 207, 221–222; *Crawford* v. *United States*, 212 U. S. 183, 194; *Weems* v. *United States*, 217 U. S. 349, 362; *United States* v. *Tennessee & Coosa R'd*, 176 U. S. 242, 256; *Royal Insurance Company* v. *Miller*, 199 U. S. 353; *United States* v. *Pena*, 175 U. S. 500, 502.

Within fifteen days after entry of the appeal in this Court the United States confirmed to the Court and to the appellees its insistence on the review of this error (R. 838, point 2).

(b) *Irregularities of corporate organization not in point*

The defense of the United States on this ground was clearly set out in its brief (U. S. Br. 60, 59–66). It is not, as the company insists, the cessation of the company's corporate existence, but rather the total lack after 1866 of any act giving to the company, irrespective of its continued existence as a corpo-

ration, whether *de facto* or *de jure*, any rights to make indemnity selections. The appellees cannot meet the argument for the appellant by misstating what it is. The attempt to do so is a confession of its soundness.

(c) *Res judicata not in point*

The *res* of this suit is a claim by the company for compensation for loss of the right to make indemnity selections from the area within the exterior boundaries of any national forest or other government reservation (App. 148). No judgment has been entered against the United States as to that *res*, U. S. Br. 125–127, 8.

The facts alleged in the stricken subdivision VI showing that the Act became a nullity on July 3, 1866, have never been otherwise adjudged, or even litigated, in any suit against the United States, whether for the same *res* or for a different *res*.

It is immaterial on this point whether or not it has ever been adjudged against the United States that the company was duly organized, or constructed the railroad, or earned the grant, but even as to these questions there has been no judgment entered against the United States.

Furthermore, an order striking out subdivision VI on demurrer (R. 412, 297, 284) cannot be justified by the subsequent introduction of evidence of prior adjudication. When the subdivision was stricken out no opportunity remained for the com-

pany to disprove the truth of the allegations of that subdivision, whether the evidence offered was of prior adjudication or *in pais*.

The appellees' brief on point 2 makes no forthright attack on the soundness of the position taken by the United States (U. S. Br. 59–66).

Under the allegations of subdivision VI the company, however perfect its corporate organization and contractual performances, cannot acquire rights to make indemnity selection under the Act of July 2, 1864, since under those allegations that Act ceased to exist on July 3, 1866, more than three years before the company began construction or filed a map of general route.

3. The phrase "agricultural lands" was used in its common sense meaning tillable, cultivable lands and not simply nonmineral lands

References: U. S. Br. 66–96; N. P. Br. 160–171.

(a) *Appellees ignore the legislative history of the mineral indemnity proviso*

In discussing the question as to the meaning of "agricultural lands" in the mineral proviso of the Act of 1864 in contradistinction to "other lands" in the general indemnity proviso of that Act (N. P. Br. 160), the company's brief avoids reference to the legislative history of the mineral indemnity proviso which reflects the answer to this question, and relies only upon three subsequent acts (N. P. Br. 163).

In order to eliminate whatever misconceptions might arise as a consequence, and in view of the difficulties of research in tracing the evolution of the mineral indemnity proviso, which is not fully shown in the brief for the United States (U. S. Br. 74–75), there is printed in this brief at page 51 as Appendix A, a list of nineteen mineral indemnity provisions, showing the origin and evolution of this proviso up to its inclusion in the first Northern Pacific bills, and its final adoption in the grant of July 2, 1864. These provisos are numbered for convenience 1 to 19.

The giving of indemnity for mineral losses originated in California, where, for about a decade after the discovery of gold on American River in January 1848, and the admission of California in 1852, all valuable lands were deemed to be mineral. Almost all of the rich agricultural lands were said to be embraced in the Spanish grants already occupied. Consequently, because mineral lands were reserved to the Government, it was difficult to make a land grant which would aid in the construction of a railroad, and indemnity selections for mineral and other losses were resorted to. At first these selections were to be in *"any unoccupied and unappropriated lands within 50 miles of said road."* (See Appendix A, Proviso Nos. 1 and 2, February 15, 1855, and April 18, 1856.) Then the Select Committee on the Pacific Railroad brought in a bill giving six sections per mile until the road reached

California, 30 sections for 200 miles into California, 40 sections to the western edge of the Sierra Nevada range, and indemnity selections in California not only for *"mineral"* and other losses, but also for *worthless land* "condemned by the United States Surveyor as unfit to be surveyed." (See Appendix A, Proviso 3, July 24, 1856; Report of Select Committee on Pacific Railways, H. Rept. 274, Vol. 3, 34th Cong., 1st sess., 1855–1856.)

These first three provisos not containing the word "agricultural," had exactly the meaning for which appellees now contend. The first two permitted selections in lieu of mineral and other losses, and the third in lieu of worthless lands as well, in "any unoccupied and unappropriated lands of the United States" within 50 miles of the road.

Even these were not deemed adequate indemnity provisions in a state where the principal lands of value were considered to be mineral. Senator Gwin, of California, on January 19, 1858, submitted a bill greatly expanding the right of indemnity for mineral losses by permitting selections in *"agricultural lands nearest to the line of the road, through said mineral lands."* No lateral limits were imposed. (See Appendix A, Provisos 4 and 5.)

In urging the adoption of this measure Senator Gwin introduced a tabulation of lands printed in the Pacific Railway Survey authorized in 1853 (U. S. Br. 72, f. n. 10), showing the number of miles on each possible route through "arable lands" and

"through lands generally uncultivable, arable soil being found in small areas." This tabulation is printed for convenience as Appendix B at page 66 of this brief.

Against this background the purpose of the Gwin provisos becomes immediately apparent. Without an excessive grant for California alone, which invited attack in Congress, the same or a better result could be had by letting the grantee search as far as it liked until it found "agricultural lands" along that portion of the route which extended "through said mineral lands."

As the tabulation introduced by Senator Gwin, and years of congressional debate clearly show, a constant subject of discussion was the amount of "cultivable soil," "arable lands," "farm lands," or "agricultural lands" which would be available along the various routes, for it was upon the proceeds from the sale of these lands that the construction of any road had to be predicated. The great problem of construction arose from the absence of such lands in certain areas, particularly in the mountainous regions where, as in the case of California, except for scattered valleys of agricultural land, the only lands of value were thought to be mineral. Under the Gwin mineral indemnity proviso the grantee, "through said mineral areas," could search far and wide for "agricultural lands."

What more natural than that Senator Doolittle, of Wisconsin, author of the later Northern Pacific

bill and manager of the Conference Committee of the Senate on the Northern Pacific bill in June 1864, should adopt Senator Gwin's equation for securing construction of the road through the mountainous regions, i. e., "through said mineral lands?" Senator Doolittle served with Senator Gwin in the Senate from 1857 to 1861 during the 35th and 36th Congresses, constantly championing construction of a road or roads to the Pacific, and continued to do so in the 37th and 38th Congresses from 1861 to 1865, until the adoption of the Northern Pacific bill of July 2, 1864.. In every one of his numerous proposals for a Pacific railroad on the northern route appears the Gwin mineral indemnity proviso, allowing selections in "agricultural lands" for mineral losses.[1] (See Appendix A, Provisos No. 7, December 14, 1858; No. 8, January 7, 1859; No. 11, January 26, 1859; No. 14, June 11, 1862; No. 15, June 19, 1862; No. 16, June 20, 1862; No. 19, July 1, 1864.)

Without reference to collateral discussions in Congress, the objects of these provisos are clear right down to No. 19, that of the Northern Pacific grant of July 2, 1864. The grantee was permitted

[1] By inadvertent error the Government's brief for the United States at p. 77 indicated that the phrase, "through said mineral lands" was dropped from the Northern Pacific grant just before its passage, whereas, in fact, it did not appear after Senator Doolittle's bill of June 20, 1862 (No. 16).

to search for valuable "agricultural lands" for indemnity for mineral losses. The Senate eliminated this proviso from the 1864 Act (undoubtedly under pressure from champions of the homesteaders' rights), but on the last day before the passage of the Northern Pacific bill, in Conference Committee, the proviso was restored in a compromise restricting selections of "agricultural lands" to an area "within 50 miles" of the road (Conf. Comm. Rep. July 1, 1864; Cong. Globe, 38th Cong., 1st Sess., 3459).

(b) *The company's failure to answer Government's Brief; errors in the company's brief*

Aside from the demonstratively erroneous construction of the Special Master, for which the company submits no authority in legislative history or otherwise, no reason is shown for departing from the plain and ordinary meaning of the words "agricultural lands" nor is any explanation given as to why the company may select indemnity in "other lands" under the general indemnity provision, in contradistinction to "agricultural lands" (U. S. Br. 94, 95). The company fails to answer (N. P. Br. 160–171) the analysis submitted for the United States which shows that not only by legislative history (U. S. Br. 69–77) but by other acts of the period (U. S. Br. 77–85) and by usage in the Department of the Interior (U. S. Br. 86–92), "agricultural" means cultivable and not simply nonmineral.

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Appellees are flagrantly in error in saying (N. P. Br. 164) "the idea that indemnity lands must be tillable did not occur to the Land Department nor to anyone else except counsel in this case." On June 2, 1926, appellees' own counsel, Mr. Kerr, said, after reciting the necessity for cultivation under the homestead laws (J. C. R. 4120):

> For that reason it followed, at least under the homestead law, that no land is subject to entry which cannot be said to be agricultural, and no land can be said to be agricultural which is not susceptible of cultivation, *and therefore I say that under the provisions of section 3, giving to the Northern Pacific the right to select agricultural lands in lieu of lands lost because mineral in character, the same rule, presumptively, applies,* and that the right of selection was confined to land which itself was subject to homestead entry, in that it was *susceptible not only of residence but of cultivation, and that the Northern Pacific could not have selected barren lands which were incapable of raising a crop.* [Italics supplied.]

Further, in answer to interrogation by Mr. Hill, a member of the Committee (J. C. R. 4123) Mr. Kerr made his position unequivocally clear:

> Mr. HILL. But that in making selections in the lieu limits for lands lost in the place limits by reason of being mineral in character, the Northern Pacific was confined to land agricultural in character, under your definition of that term "agricultural lands"?
>
> Mr. KERR. *Yes.*

> Mr. HILL. And that definition of "agricultural lands" excludes any lands within the lieu limits which by reason of altitude or any other conditions are not suspectible of homestead entry, we will say, as agricultural lands?
>
> Mr. KERR. *I think that is correct.*
>
> [Italics supplied.]

The company's own brief (N. P. Br. 170) says: "There is no instance in the records of the Land Department, in Acts of Congress, or in decisions of the courts, of the distinction between agricultural lands and tillable lands" (U. S. Br. 69, 78–92; and see *United States* v. *Budd*, 144 U. S. 154, 167).

Lastly, although it has no tendency to show that "agricultural" means the same as "non-mineral," appellees cite Land Office decisions (N. P. Br. 169) to the effect that land chiefly adapted to the raising of stock could be settled without "cultivation" under the homestead laws. Admittedly, portions of the areas at issue are used during limited seasons of the year, usually from one to three months, for the grazing of stock through mountain meadows. Sheep are driven from 10 or 12 miles to 150 or more miles. These limited summer pastures are for the most part located at high altitudes, are under snow a good portion of the year, are almost wholly uninhabitable and incapable of sustaining settlement by the raising of livestock in the sense permitted in Land Office decisions referred to. Such limited grazing operations as are carried on

were for the most part made possible in the last twenty or twenty-five years because these areas were embraced in national forests. In many forests the constructing of trails and the eradication of poisonous grasses under Government care have made limited grazing possible (unprinted narrative statement 369 to 388). No decision of the Land Office ever sustained a homesteader's "settlement" of such country for stock raising because nature would not do so.

It is submitted that appellees have shown no grounds upon which to sustain the selections of the areas at issue as "agricultural land."

4. Failure to complete the whole road

References: U. S. Br. 96–115; N. P. Br. 24–58.

The original brief of the United States (U. S. Br. 96–115), with a few exceptions, completely answers the company's brief on this point. The appellees claim (1) that the contention is not open because it was not made in the district court (N. P. Br. 28), and (2) that Congress waived the condition (N. P. Br. 25, 32–38).

(1) The contention was made in the district court

The company's brief says "The only reference made to the Columbia River line is in subdivision XXVII of the complaint." (N. P. Br. 28.) As is apparent from the brief for the United States (U. S. Br. 96) and from the complaint itself (R. 23,

49–52), this statement is erroneous. On July 31, 1930 (R. 1) the United States prayed the court to determine, for the reasons set forth in the complaint, that the company was not entitled to any compensation on account of the retention of indemnity lands (R. 81). One of these reasons was that the railroad between Wallula and Portland had never been constructed (R. 23, 26, subdivision XIV; R. 53, subdivision XXVI). On the company's demurrer both of these subdivisions were stricken from the complaint (R. 412). The United States excepted to the action of the master in sustaining the demurrer to them (R. 404, last line; R. 402, line 29) and to the order striking them out (R. 413, Par. (9) and Par. (22); R. 414, Par. (28) and Par. (31)). The United States excepted also to the allowance of any compensation on the ground that the company did not construct the road contemplated by the contract and because the facts alleged in the complaint show that the company is not entitled to compensation (R. 576, Pars. (b) and (c)). Quite contrary to the view expressed in the company's brief, it is clear from the record that this contention is based upon the allegations of the complaint and has been persistently asserted.

(2) *Congress did not waive the condition*

Except for certain of the contentions in the company's brief, this subject has been covered already (U. S. Br. 107–111, 127–129, 134–138). The posi-

tion of the United States is, and consistently has been that, irrespective of the company's failure to complete the road *on time,* its right to make indemnity selections had no existence after it had become certain that the company was *permanently* in default in the performance of the condition that it complete the whole railroad. While acceptance of the road constructed out of time might, under certain circumstances, constitute a waiver of the time of completion, there could be no similar waiver of noncompletion.

The statement in the company's brief that, "In 1882 the 47th Congress deliberately elected not to forfeit" (N. P. Br. 30), is not supported either by any facts alleged in the stricken subdivisions, or by any provable facts. The company's own references show that in 1882 it was expected that the company would perform its contract and carry out its declared intention to complete the whole railroad and that Congress had under consideration only the question whether any action on its part at that time would tend to insure the speedy completion of the road (N. P. Br. 30). The committee report itself refers to the assertion of the company that it will finish the road (N. P. Br. 31).

The connection from the East to Tacoma by way of the branch line was not completed until 1887 (R. 323). The record fixes no definite time, if there ever was one, when the company announced or

admitted that it had abandoned its declared intention to complete the whole road. Whatever time may be taken there is no action by Congress which could be construed as waiving the company's breach of the contract and its failure to comply with the condition expressed in the grant.

While the construction of this railroad was still going forward Congress took up the matter of the administration of the grants to the several land grant railroads. From this resulted the Act of March 3, 1887, c. 376, 24 Stat. 556 (App. 72). It had no peculiar reference to the Northern Pacific Railroad Company. Congress directed that the act should not be construed "as a waiver of any rights which the United States may have on account of any breach of said conditions."

Shortly thereafter, in 1889, when there was still nothing to indicate the company had abandoned its intention to complete the whole road Congress expressly provided against any waiver of the right of forfeiture, in the Act for the relief of settlers (App. 76–77). This Act related to the Northern Pacific grant only.

Only a year later, on September 29, 1890, Congress enacted the General Forfeiture Act, applicable to all land grant railroads (App. 78), providing for resumption of title to any land "opposite to and coterminus with the portion of any such railroad not now completed and in operation for the construction or benefit of which such lands

were granted." This provision had no application to any lands of the Northern Pacific Railroad Company because no lands opposite any unconstructed portion of the railroad had vested in that company. The act also provided (App. 78) that: "This act shall not be construed as forfeiting the right-of-way or station grounds of any railroad company heretofore granted." This merely preserved to the railroad companies, including the Northern Pacific, the franchise to build and operate over the uncompleted portions of their respective railroads. Thus, Congress left the company free to perform the condition by completing the railroad from Wallula to Portland and thence to Puget Sound.

This General Forfeiture Act contains no expression, and invites no implication, that Congress intended to waive the expressed condition that the whole railroad should be completed (U. S. Br. 108–111). The extended references to the legislative proceedings (U. S. Br. 111) and the quotations in the company's brief (N. P. Br. 45–49) show that the absence of an express legislative negation of any waiver, by the positive reservation of a right to require further forfeiture, was due to the efforts at compromise between the Senate and the House and to the belief "that the bill without it was exactly as strong as with it, as the provision gave no rights to Congress which Congress did not already have" (N. P. Br. 47).

That Congress considered that the right to withdraw the grant for breach of conditions on the part of the company persisted after the General Forfeiture Act is apparent from subsequent legislation.

For example, the Mineral Classification Act of February 26, 1895 (App. 95) provided (App. 101): "That nothing contained in this Act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in anywise affecting any right on the part of the United States against the said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company."

It does not appear that the railroad company had declared or admitted, at that time, that it had abandoned its intention to complete the whole railroad as required by section 8 of the grant.

The company fails to support with any reference the statement that: "From 1890 to June 25, 1929, a period of thirty-nine years, Congress passed thirty-four acts, each and every one of which recognized the completion of the railroad and the right of the company to its land grant" (N. P. Br. 56). No acts have been cited nor have any come to light which support it (App. 78–148).

When occasion arose for action by Congress on this subject it provided, by the Act of June 25, 1929, that if the company had any indemnity selection rights they should be forfeited (App. 149).

Congress had taken no prior action which stood in the way of its requiring this limited forfeiture by the company of any unexercised selection rights as a consequence of its failure to fulfill the condition of completing the whole railroad.

No forfeiture was necessary because the defaulting company had no selection rights; but this action was a clear declaration that Congress had no intention to waive the company's nonperformance and breach of condition.

No official or body other than Congress had power to waive the condition and neither Congress nor any official of the United States ever purported to waive it, either expressly or by implication (U. S. Br. 134–138, 107–111).

As far as concerns the indemnity lands which are the subject of the decree for compensation, the United States elected more than forty years ago to permit no more selections from them. These lands were placed within the forest reserves, beginning, for the major part, on March 1, 1898, and continuing thereafter up to March 1907. This began only three years after Congress had expressly declared that no waiver of the rights of the United States was to be inferred from the action of Congress (App. 101).

5. Unnecessarily circuitous route

References: U. S. Br. 116–120; N. P. Br. 87–93.

The company's brief attempts to defend the action of the court and the master, in sustaining a

demurrer to subdivision XXVI (R. 321–328) on the basis of the master's personal opinion that the allegations of fact contained in the subdivision were not true (R. 49–58). It cites *Arizona* v. *California*, 283 U. S. 423, 452, in which judicial notice of the error of an allegation that the Colorado River south of Black Canyon was not navigable, was approved. That case has no bearing on the propriety of substituting the master's personal opinion for the allegations of fact contained in the stricken subdivision in question here. It is patent that the route from Lind to Pasco and thence to Ellensburg is approximately eighty-two miles longer than the route from Lind to Ellensburg. The Court, and *a fortiori* the master, cannot take judicial notice that a shorter route, actually operated for the Milwaukee railroad, is not more direct and practicable. In paraphrase, what the master has done is equivalent to saying that a railroad from Albany to Buffalo, if it goes via New York City, Philadelphia, and Pittsburgh, is more direct and practicable than a road by the direct line between the two points because there is more traffic obtainable along the more devious route. The master has made two errors, (1) in substituting his own opinion for the provable true allegation and (2) in substituting commercial advantages for shorter distance and railroading practicability.

The company, in its brief (N. P. Br. 92), continues to claim that it had the right to adopt a more cir-

cuitous and less practicable route if it was to its local commercial advantage to do so. This Court has decided otherwise (U. S. Br. 117). Further reply on this point would merely repeat the argument already fully covered in the earlier brief (U. S. Br. 116–120).

6. Estoppel, *res judicata*, acquiescence and waiver

References: U. S. Br. 120–138.

The company's brief does not deal with these topics except in conjunction with the other separate points.

7. No right to compensation for all the lands covered by the decree

References: U. S. Br. 139–143; N. P. Br. 139–141.

The original brief for the United States fully answers in advance the contentions made by the company on this point, U. S. Br. 139–143.

8. Treaties of 1851 and 1855

References: U. S. Br. 144–155; N. P. Br. 93–121.

These errors in the company's brief on this point should be noted:

(1) The tract of 44,672,000 acres which this Court described as a reservation was the tract defined in the earlier Shoshone Treaty before the later cession (U. S. Br. 154). The company's brief errs in saying that this is a mistake (N. P. Br. 109).

(2) The brief (N. P. Br. 96) misstates the contention of the United States as to the scope of the obligation to extinguish Indian titles. The contention is that the obligation is limited to lands "falling under the operation of this act" and does not extend to lands excepted from the grant in section 3 (U. S. Br. 155, 11) and that the lands in the reservations in question do not fall within the operation of the act, and are excepted by section 3.

The statement that the point has been decided against the contention of the United States in *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, and *Atlantic and Pacific Railroad* v. *Mingus,* 165 U. S. 413, is, we submit, contrary to the evident effect of those decisions. In the latter case in speaking of an exception in substantially the same terms as those of section 3 this Court said (435): "If the grant stood upon this language alone, there could be no doubt that, as the lands in the Indian Territory had been set apart for the sole use and occupancy of the various Indian tribes, they were reserved lands within the meaning of that section" * * * (438). "The railroad company was in no position to insist that the Government should extinguish these titles," * * * (439). "That it required the United States absolutely and at all hazards to extinguish such titles, and to take from the Indians a strip of land forty miles in width through the entire Territory, and open it to settlement, is not only inconsistent with their

treaties and with their agreement with the company, but one which involved a grave disturbance, if not practically the upsetting of a long-established Indian government." The obligation to extinguish Indian titles did not extend to lands excepted from the grant in section 3. It extended only "to all lands falling under the operation of this act and acquired in the donation" (App. 40). The lands reserved to the Indians by the treaties were not such lands.

(3) The brief (N. P. Br. 96) errs in saying that the 2,800,000 excess acres do not appear in the record. The record references are given (U. S. Br. 145). They show that at the most for the company, outside the lands covered by the treaties of 1851 and 1855, there were available in place, first indemnity, second indemnity, and mineral indemnity limits under the grant of 1864 not over 35,000,000 acres. The company, in its pleading, admits the receipt of a quantity of land of 2,800,000 acres in excess of this (R. 201, line six from bottom). The 38,301,016.94 acres now admitted (N. P. Br. 133) increases the admitted excess to 3,301,016.94 acres.

(4) The brief (N. P. Br. 118) errs in saying "* * * the Union Pacific and Kansas Pacific would have sustained a loss, at the rate of only 20 sections per mile, of approximately 9,000,000 acres (R. 765)." This statement fails to reveal that before the grants to the Union Pacific

and Kansas Pacific had been made the Indians had ceded to the United States approximately 90% of these 9,000,000 acres, and before the date of the definite location of the Kansas Pacific road, had ceded over 95% of it. (Treaty of October 14, 1865, 14 Stat. 703; Treaty of February 18, 1861, 12 Stat. 1163.) The company conceded in its briefs before the Master and in the district court that the above-quoted assertion, now repeated, was an error (reply brief before Master, p. 166; brief before court, pp. 310–311).

(5) If, as the United States contends, the treaties of 1851 and 1855 reserved or appropriated these lands to the treaty Indians, nothing has happened to estop the United States from showing that fact. The claim to the contrary (N. P. Br. 112) is without merit. No official of the United States was authorized to issue patents contrary to law. The facts of use and occupancy and of the treaties were well known to the company. No facts or matters of administration were in question. The company by obtaining unauthorized patents from officials of the United States could not estop the United States (U. S. Br. 127–129, 161–162). The cases cited at N. P. Br. 121 are not to the contrary. The estoppel applied in them was not by unauthorized acts. Furthermore, the suit at bar is under the Act, June 25, 1929, which was enacted to enforce a policy of Congress to have corrected the mistakes which have been made (U. S. Br.

120–125). Principles of estoppel against the United States "will not be applied to frustrate the purpose of its laws or to thwart public policy." *Pan American Co.* v. *United States,* 273 U. S. 456, 506.

(6) The intimation (N. P. Br. 115) that Congress in the General Adjustment Act of March 3, 1887, was acting on the decision in *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, November 15, 1886, is also without merit. The General Adjustment Act came out of a bill introduced in the House on March 22, 1886, eight months before the *Buttz* case was decided and was to cover adjustment of railroad land grants in the State of Kansas. H. R. 7021; H. Rept. No. 1619, 49th Cong., 1st sess.; Cong. Rec., 49 Cong., 1st sess., p. 4109. It passed the House on May 3, 1886, and it was favorably reported in the Senate with some amendments on June 3, 1886. Cong. Rec., 49th Cong., 1st sess., p. 5182. There is nothing in the debates at this time or in the later proceedings prior to its final enactment on March 3, 1887, to indicate that the decision in the *Buttz* case was considered by either the House or the Senate. Cong. Rec., 49th Cong., 2d sess., pp. 1431, 2170, 2376–8, 2434, 2625, 2650, 2715, 2728, and 2754.

(7) Neither the decision in the *Buttz* case cited above nor the decision in *Beecher* v. *Wetherby,* 95 U. S. 517, also cited as contrary to the contentions of the United States (N. P. Br. 100), is in fact con-

trary thereto. In *Beecher* v. *Wetherby, supra,* the United States had granted the land in question to the State of Wisconsin by the act providing for its admission as a State unless "such section has been sold or otherwise disposed of" (p. 518). The convention to form the State Constitution was held, beginning February 1, 1849 (p. 518). By no Indian treaty construed most broadly had the United States sold or otherwise disposed of the sections in question to the Indians. Not only had no prior treaty made any such sale or disposal but also, before the convention met, the Indians had agreed to cede to the United States all their lands in Wisconsin with a stipulation that the Indians could remain there for a period of two years and until the President notified them that the lands were wanted (p. 518). In *Buttz* v. *Northern Pacific Railroad,* 119 U. S. 55, the lands in question were in North Dakota. They were not within any treaty limits and not within the original habitat of the Sisseton and Wahpeton Indians whose habitat was in Minnesota. When the Act of July 2, 1864, was passed, these Indians, after levying war on the United States, fled to North Dakota and elsewhere. In consequence of the war, on February 16, 1863, 12 Stat. 652, Congress abrogated and annulled all treaties with these Indians and forfeited all their rights to any lands or to use and occupancy thereof. On July 2, 1864, these lands were preeminently clear public lands of the United States; not subject

to any reservation or appropriation to the Indians or to their use. On February 19, 1867, a treaty was made with these Indians (15 Stat. 505) setting up defined reservations for them and containing a cession by them of the right to construct railroads and other roads, stations and lines, and other improvements, over all the lands which they claimed, including the reservations (119 U. S. 58). The lands in question in the *Buttz* case were not within that reservation. It does not appear what lands they claimed outside the reservation. Whatever they claimed, the claim could not depend on any treaty with the United States, because all treaties had been annulled by the Act of 1863 and no prior treaty had included the lands involved in that case. This is the reason why this Court described the country merely as "Indian country" (119 U. S. 66), a term well understood to be not synonymous with land reserved or appropriated. It is impossible to say that the United States, if, on July 2, 1864, it granted the land in controversy in the *Buttz* case to the Northern Pacific Railroad Company, violated any treaty with the Indians or infringed upon any reservation or appropriation made for those Indians. The fact that the land was not within the reservation or appropriation appears at least inferentially in the statement in the case itself and in the opinion (119 U. S. 56–63, 66–73), and in the description in the case at bar (R. 349–368), and in even more detail in *Sisseton and*

Wahpeton Indians v. *United States*, 58 C. Cls. 302, 323. That the only lands as to which the Indians could, by any possibility, have claimed treaty rights did not include the lands in North Dakota in question in the *Buttz* case is confirmed by reference to other sources:—House Doc. No. 736, 56 Cong. 1st Sess., being the Eighteenth Annual Report of the Bureau of American Ethnology, Areas Numbered 289, 414, and 440, Minnesota Plate No. 1, Areas Numbered 496 and 497 on North and South Dakota Plate No. 1, Area No. 443 on North and South Dakota Plate No. 2; 10 Stat. 949; 12 Stat. 819; 15 Stat. 505. In view of these circumstances the statement in the company's brief (N. P. Br. 102), that the land involved in the *Buttz* case outside the boundaries defined for the reservations in the treaty "had precisely the same status as the lands claimed by the Indians and defined by the Treaty of Fort Laramie" does not help the company's argument. There is nothing in the decision in the *Buttz* case or indeed in any other decision of this Court which conflicts with the many cases holding that where, by treaty with the Indians, the United States has reserved or appropriated lands to their use and occupancy, the lands are no longer public lands unreserved and unappropriated. Such lands are not within the grant made in section 3 of the Act of July 2, 1864, but are within the exception from the grant.

9. Treaty of May 7, 1868

References: U. S. Br. 156–166; N. P. Br. 93–121.

The company's brief makes no answer to the brief for the United States on this point beyond what is said in dealing with point 8. It requires no further reply. There is no answer, it is submitted, to the additional arguments which support point 9, U. S. Br. 156–166.

10. Northern Cheyenne Indian Reservation

References: U. S. Br. 166–170; N. P. Br. 158–159.

The brief for the United States has covered fully all the contentions made by the company's brief on this point, U. S. Br. 166–170.

11. Unsurveyed lands

References: U. S. Br. 171–177; N. P. Br. 141–153.

The brief for the United States meets fully the arguments made on this point in the company's brief (U. S. Br. 171–177), but several points merit brief comment.

The company's brief (N. P. Br. 142) errs in stating that "it is admitted that a deficiency continued during all of the period covered by the withdrawals" and again (N. P. Br. 153) in saying that "it is conceded that there was on March 1, 1898, and at all times thereafter to the present time, a

very large deficiency in the 1870 grant, even counting surveyed, unsurveyed, and mineral lands." The statement ignores the many contentions made by the United States. Examples of these are to be found at pages 111–115, 171 of the brief of the United States. From unprinted exhibits 89, 91, 94, 96, E and F it is apparent by computation that if unsurveyed lands should be counted there was no deficiency in Montana second indemnity limits after the withdrawals of March 1, 1898, and that that withdrawal was and is valid.

The company concedes on page 143 of its brief that, if unsurveyed lands should be considered, the withdrawal of March 1, 1898, in Idaho, second indemnity limits would be valid. It follows that the decree below is erroneous in awarding compensation for 23,364 acres in such limits.

The company's brief makes no real answer to the patent fact that if, after a withdrawal, the United States continued to have, within the described limits, enough land to meet all unsatisfied selection rights there is no deficiency, notwithstanding that surveys may be necessary in order to define the boundaries (U. S. Br. 171–177).

12. Subsequent restorations and surveys

References: U. S. Br. 178–180; N. P. Br. 154–156.

The appellees' brief contains no answer to the argument made for the United States on this

point, but merely states that it is a shift of position and one not taken in the court below. On the contrary it was taken in the court below (R. 656, Assignments 36–39). The testimony on the point is at pages 169–172 of the unprinted typewritten transcript of evidence. The exception on the point is explicit and detailed (R. 571–572, Exception XLVII). That the second indemnity limits had not already been laid down is no answer. It does not appear that second indemnity limits ever were laid down until the company applied to have this done, so that it could make desired selections.

Reduced to narrative form, the testimony referred to included the following: Exhibit 96 is a tabulation showing the used and unused second indemnity base as to Idaho and the lands available in the second indemnity limits and the withdrawals therefrom. After the withdrawal of 163,280 acres in 1898, there were 270,783.37 acres in second indemnity limits in Idaho, or 239,903.61 acres in excess of the requirements to satisfy second indemnity losses. The testimony covers the other dates in like detail. This testimony and the exhibits cited cover every fact stated on this point in the brief for the United States (U. S. Br. 178–180). Also they show unanswerably that the contention on the point was made in the district court.

13. Homestead entries

References: U. S. Br. 181–182; N. P. Br. 157–158.

The United States contends (U. S. Br. 181) that the Act of June 25, 1929, provides no compensation for lands entered by homesteaders before June 5, 1924—that by the terms of that Act, land to be eligible for compensation, among other things, must have been removed from the grants by the 1929 Act and by that Act retained by the United States as part of the Government reservation wherein it is located, and that land entered by homesteaders prior to June 5, 1924, does not meet these requirements. The settlors' rights having been perfected as of the dates of their entries, before the critical date of June 5, 1924, such lands belong to them as of that earlier date, and therefore being neither withdrawn by the Act of June 25, 1929, from the grants nor retained by that Act within the Government reservations of which they had ceased to be part, are not within the description of lands eligible for compensation. The Company's brief does not touch upon this contention. Moreover, there is no showing that these lands were selectable at the time of their original withdrawal.

14. The company's accountability for unlawful profits

References: U. S. Br. 183–200; N. P. Br. 121–129.

On this point the company's brief errs in stating (N. P. Br. 123): "It is admitted that our lands

were covered by mortgage five years after completion of the railroad." That the United States did not admit that the lands were covered by any effective mortgages is plainly evident (U. S. Br. 193, line 18). The United States had alleged that the corporation which issued the mortgages was not authorized to do so (R. 19, subdivision X, 1st par.). This was stricken out on the application of the company (R. 412). The United States excepted (R. 414, par. (31)). The United States alleged that the mortgages were by a pretended corporation and not by the real corporation (R. 27, subdivision XVI). The company cannot with propriety say that the United States has ever admitted that the lands were covered by mortgage five years after completion of the railroad. The appellees' own brief in speaking of the only mortgages, if any, existent July 4, 1884, says (N. P. Br. 127): "From this premise it argues that the power was exhausted by the mortgage placed by Jay Cooke in 1870 and foreclosed in 1875, and that the subsequent mortgages were unauthorized."

Likewise erroneously, the brief says (N. P. Br. 125) "The Government cites, though it does not rely on, *O. & C.* v. *United States* (238 U. S. 393)." The brief for the United States unmistakably shows that that case is relied upon (U. S. Br. 194, 196, 191, 193, 199, and 200).

The company's brief also says (N. P. Br. 126), without justification, that, "It was insisted below, though not in this Court, that the

proviso applied as well to the 1864 grant as to the 1870 grant." It appears clearly in the brief for the United States that the point is urged here as well as below (U. S. Br. 193, lines 13–18).

In place of the allegations of the United States, made in subdivisions stricken out on the company's application (R. 412), that the company has received values in excess of $200,000,000 (R. 36), the brief attempts (N. P. Br. 127) to substitute the company's allegation as to the amount received for lands already sold. Inasmuch as the question arises on demurrer, the company's allegations have no relevance.

The brief asserts (N. P. Br. 127), that the validity of the later mortgages is *res judicata*. Manifestly, this is not so. The United States was not a party to the suit in which the consent decree was entered.

The brief says (N. P. Br. 124), "It is not even claimed that the company interfered with the right of preemption, if any there was." The brief for the United States on the contrary, asserts that the company did interfere with the right of preemption (U. S. Br. 192). Subdivision XIII, stricken out on the application of the company (R. 412), had alleged the sales by the company (R. 23) which prevented any preemption.

The brief argues (N. P. Br. 127–128), that the only mortgage prohibited was one on the road. It is submitted that this construction of the prohibition, so favorable to the company, is unwarranted.

Sec. 10 (App. 47) twice prohibits a mortgage. It says: (1) "No mortgage or construction bonds shall ever be issued by said company on said road"; (2) "or mortgage or lien made in any way." As the first clause fully covers any mortgage on the road the second has no function unless it applies to the other property of the company. The two clauses were used in a section which shows clearly that it was the intention to have the shareholding interest free of any underlying mortgage on the property of the company (U. S. Br. 192).

It is manifest that the Northern Pacific Railroad Company, even if it was authorized to mortgage its property after the mortgage first imposed was out of the way, could convey by later mortgages no greater rights than the corporation had. Therefore, if on foreclosure the company acquired any title in 1896 it was subject to the conditions and obligations to which the company's title was subject. Among these were the requirements of the preemption proviso of 1870 (App. 58), which subjected the lands to preemption at not exceeding $2.50 per acre.

The brief asserts (N. P. Br. 126): "The debates conclusively establish that Congress considered and rejected the covenant requiring sales to actual settlers at $2.50 per acre, and that it deliberately refused to make the mortgages subordinate to the rights of settlers." This is an error. It is sub-

mitted that the brief for the United States on point 14, U. S. Br. 190–200, answers fully the company's contentions on this point.

15. Tacoma overlap.

Reference: U. S. Br. 201–224.

The company's brief contains no answer to the brief for the United States with respect to the Tacoma overlap. Therefore, no reply is necessary. The company's contentions made with respect to this point in its brief in No. 477, filed Jan. 26, 1940, are covered with one exception by the brief previously filed by the United States (U. S. Br. pp. 201–224). The company's remaining contention is that if the main line to Puget Sound via the valley of the Columbia River and the Cascade branch to Puget Sound had been built under one grant, the company would have been entitled to the alternate sections in the quadrant northwest of Tacoma. This contention is unsound. It is based on the assumption that the railroad would be a loop, west of Pasco, without a western terminus. Both the Act of 1864 and the Resolution of 1870 show that this is not the case. The main line and the branch each was to have a western terminus—under the 1864 Act, one at Puget Sound and the other at or near Portland (App. 37) and under the Resolution of 1870, both at Puget Sound (App. 57). It is these two terminal lines which exclude this north-

west quadrant, whether the grant be treated as on
or two.

Respectfully submitted.

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Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General.
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MARCH 1940

APPENDIX

APPENDIX A

The following compose a list of provisos from various bills proposing grants of lands to aid in construction of Pacific Railroads, showing the first mineral indemnity provision in 1855 and its evolution in the principal bills where it was embodied, and its adoption into the Northern Pacific grant of July 2, 1864. These provisos are numbered for convenience, 1 to 19. Throughout the quotations italics are supplied.

MINERAL INDEMNITY PROVISO NO. 1

S. 273, Bill by Senator Gwin (Calif.) from Select Committee on Pacific Railroads, March 13, 1854 (33d Cong., 1st sess.). Amendment by Senator Gwin, February 15, 1855 (33d Cong., 2d sess., Cong. Globe, p. 749).

This amendment struck out all the original bill after the enacting clause and contained a proviso with respect to indemnity lands for mineral and other losses with provision for 50-mile limits in the State of California, as follows:

> * * * and in all cases when the United States may have disposed of said lands, or any part thereof, or shall from any cause be unable to convey a title thereto, the deficiency party or parties who may become entitled thereto from any *unoccupied and unappropriated lands belonging to the United States within the distance of thirty*

miles of said road: Provided, however, That for such deficiency within the State of California, and also in lieu of all mineral lands in said state (which are hereby excepted from the appropriation herein made), such selection may be made *from any unoccupied and unappropriated lands of the United States within fifty miles of said road in said state.*

(Section 1.)

PROVISO NO. 2

S. 186, Reported by Sen. Weller (Calif.) from Select Committee, March 24, 1856. (34th Cong., 1st sess., 1856.) See p. 962, Cong. Globe, April 18, 1856.

This bill granted the alternate odd-numbered sections for a distance of twelve miles on each side of the road. The indemnity provision made special provision for selection within 50 miles in the State of California, and read as follows:

* * * and in all cases when the United States may have disposed of said lands, or any part thereof, or shall from any cause be unable to convey a title thereto, the deficiency may be made up by the party or parties who may become entitled thereto from any *unoccupied or unappropriated lands belonging to the United States within the distance of thirty miles of said road: Provided, however,* That for such deficiency within the State of California, and also in lieu of all mineral lands in said State (which are hereby excepted from the appropriation herein made), such selection may be made from any *unoccupied and unappropriated lands of the United States within fifty miles of said road* in said State.

(Section 1.)

PROVISO NO. 3

Pacific Railroad and Telegraph Bill, July 24, 1856, reported from the Select Committee, 34th Congress, 1st Session, 1855–56, House Reports, Vol. 3, Report No. 274.

This bill reported by the Select Committee contemplated the construction of a railroad and telegraphic communication from the western boundaries of Missouri and Iowa to some point on the navigable waters of the Pacific Ocean in the State of California, granting six alternate sections on each side of the road for that portion of the line to the eastern boundary of the State of California, and from this point to the ocean thirty alternate sections on each side of the road for 200 miles, and forty alternate sections to the western base of the Sierra Nevada range, and thence through the State of California six alternate sections per mile. The indemnity provision read as follows:

> * * * and in all cases where the United States may have disposed of any such lands, or shall from any cause be unable to convey a title thereto, *or when such land shall be condemned by the United States surveyors as unfit to be surveyed,* the deficiency may be made up in like manner by alternate sections, by the party or parties entitled thereto, from the nearest *unoccupied and unappropriated public lands belonging to the United States north of the thirty-eighth degree of north latitude: Provided, however,* That for such deficiency in the State of California, and also in lieu of all mineral lands in said state (which are excepted from the grant herein made), such selection may be

made from any *unoccupied and unappropriated lands of the United States, within the said State of California, lying north of the thirty-seventh degree of north latitude.*

PROVISO NO. 4

S. 65, Mr. Gwin from Select Committee, January 19, 1858 (35th Cong., 1st sess.).

This bill as reported authorized the President to make a contract for the building of the railroad and the transportation of mail, troops, etc., from the Missouri River to San Francisco. The bill contained the following proviso; excluding mineral lands in California and giving in lieu thereof agricultural lands nearest the road:

> And in all cases where the United States may have disposed of said lands or from any cause cannot convey a legal title thereto, the deficiency may be made up from any *unoccupied and unappropriated public lands within the distance of forty miles on either side of said road: Provided,* That all mineral lands within the State of California be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural lands nearest to the line of the road, through said mineral lands,* may be selected in alternate sections.
>
> (Bill contained no iron and coal proviso.)

PROVISO NO. 5

S. 65, Mr. Gwin from Select Committee, January 19, 1858 (35th Cong., 1st sess.).

On January 28, 1858, Mr. Foot (Vt.) proposed a substitute with the following indemnity provision:

And in all cases where the United States may have disposed of said lands or any part thereof, or from any cause cannot convey a legal title thereto, the deficiency may be made up from any *unoccupied and unappropriated public lands within the distance of forty miles on either side of said road: Provided,* That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural lands nearest to the line of the road, through said mineral lands,* may be selected in alternate sections.

(Section 4.)

(Bill contained no iron and coal proviso.)

PROVISO NO. 6

H. R. 411, By Congressman McKibben (Calif.), March 16, 1858 (35th Cong., 1st sess.).

Section 5 of this bill proposed to grant odd numbered alternate sections of land for a distance of 20 miles on each side of the road and contained the following provision for indemnity for lands lost to the grant:

> And in all cases where the United States may have disposed of said lands, or any part thereof, or from any cause cannot convey a legal title thereto, the deficiency may be made up from any *unoccupied and unappropriated public lands within a distance of forty miles on either side of said roads: Provided,* That all mineral lands within the State of California, or in any Territory through which said roads may pass, be, and the same are hereby, excluded from the operation of this act; and in lieu thereof a like quantity of *unoccupied and unappropriated*

agricultural lands nearest to the line of the road, through said mineral lands, may be selected in alternate sections.

(Bill contained no iron and coal proviso.)

PROVISO NO. 7

S. 65, Mr. Gwin from Select Committee, January 19, 1858 (35th Cong., 2d sess.).

On December 14, 1858, Senator Doolittle (Wis.) proposed an amendment authorizing the construction of three roads. The indemnity proviso was as follows:

> And in all cases where the United States may have disposed of said lands or any part thereof, or from any cause cannot convey a legal title thereto, the deficiency may be made up from any *unoccupied and unappropriated public lands within the distance of forty miles on either side of said road: Provided,* That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural lands nearest to the line of the road, through said mineral lands,* may be selected in alternate sections.
>
> (Bill contained no iron and coal proviso.)

PROVISO NO. 8

S. 65, Mr. Gwin from Select Committee, January 19, 1858 (35th Cong., 2d sess.).

On January 7, 1859, Senator Doolittle offered a substitute bill authorizing the construction of three roads. The indemnity proviso read as follows:

> And in all cases where the United States may have disposed of said lands, or any part

thereof, the deficiency may be made up from the sales of any odd-numbered sections of the *public lands within the distance of forty miles on either side of said road: Provided,* That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural land nearest to the line of said road, through said mineral land,* may be selected in alternate sections.

PROVISO NO. 9

S. 65, Bill by Senator Gwin from the Select Committee, January 19, 1858 (35th Cong., 2d sess.). Amendment proposed by Senator Bigler (Pa.) on January 14, 1859, and adopted by Senate (Cong. Globe, p. 375).

This amendment struck out the 4th, 5th, 6th, 7th, and 8th sections of the original bill and substituted section 4 which contained a provision for making up the deficiency on account of losses to the grant from unoccupied and unappropriated lands within 40 miles of the road, and also a specific provision excluding mineral lands in California and permitting selection of unoccupied and unappropriated agricultural land nearest the road "through said mineral land." The proviso follows:

And in all cases when the United States may have disposed of said lands * * * the deficiency may be made up from any *unoccupied unappropriated public land within the distance of forty miles* on either side of the road: *Provided,* That all mineral lands within the State of California be and the same are hereby excluded from the operation of

this Act; and, in lieu thereof, a like quantity of *unoccupied and unappropriated agricultural land, nearest to the line of the road, through said mineral land,* may be selected in alternate sections.

PROVISO NO. 10

S. 65, Bill by Senator Gwin from the Select Committee, January 19, 1858 (35th Cong., 2d sess.). Amendment proposed by Senator Wilson (Mass.), January 25, 1859 (Cong. Globe, p. 578).

This amendment in section 9 contained an indemnity provision excluding mineral lands from the grant and permitting the selection in lieu thereof of "unoccupied and unappropriated agricultural land nearest to the line of the road through said mineral land," as follows:

> *Provided,* That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof, a like quantity of *unoccupied and unappropriated agricultural land nearest to the line of the road through said mineral land* may be selected: *And provided further,* That the 16th and 36th sections within the boundaries heretofore named shall be set apart for school purposes, which shall be exclusively applied for said purposes and no other.

PROVISO NO. 11

S. 65, Senator Gwin from Select Committee, January 19, 1858 (35th Cong., 2d sess.). Proposed amendment by Senator Doolittle (Cong. Globe, p. 607, January 26, 1859).

This amendment struck out all after the enacting clause and substituted new provisions. The

indemnity proviso provided for the making up of deficiencies where the United States had sold the land from sales of odd-numbered sections within 40 miles on either side of the road and provided that mineral lands should be excluded, the losses to be satisfied from unoccupied and unappropriated agricultural land nearest the line of the road through said mineral land. The proviso follows:

> And in all cases where the United States may have disposed of said lands the deficiencies may be made up from the sales of any of the odd-numbered sections of the *public land within the distance of 40 miles* on either side of said road. *Provided,* That all mineral lands be and the same are hereby excluded from the operation of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural land nearest to the line of the road through said mineral land* may be selected in alternate sections.
>
> (Section 4.)

PROVISO NO. 12

S. 12, Mr. Gwin, December 22, 1859 (36th Cong., 1st sess.).

This bill provided for a central route from the Missouri River to San Francisco. It granted alternate, odd-numbered sections for twenty miles on each side of the road.

The indemnity proviso read as follows:

> * * * and in all cases where the United States may have disposed of said lands, or any part thereof, or from any cause cannot convey a legal title thereto, the deficiency may be made up from any unoccupied and unappropriated public lands within the dis-

tance of forty miles on either side of said road: *Provided*, That all mineral lands within the State of California be, and the same are hereby, excluded from the operation of this act; and, in lieu thereof, a like quantity of *unoccupied and unappropriated agricultural lands nearest to the line of the road, through said mineral land*, may be selected in alternate sections.

PROVISO NO. 13

H. R. 701, 36th Cong., 2d sess., 1860–1861.

On consideration of this bill by the Senate as a Committee of the Whole, Senator Benjamin's (La.) amendment of January 17, 1861 (Cong. Globe, p. 427), was adopted.

This amendment provided for the satisfaction of deficiencies from the mineral and other losses by selections made within six miles from the road, as follows:

> And when the United States have disposed of any such sections, or for any other reason cannot convey title thereto, *or when the same shall be condemned by the United States Surveyor as worthless*, and his decision be approved by the Secretary of the Interior; *or when the same shall be mineral land, or if the same shall be occupied* at the date of the application to the President to withhold them from settlement and sale as hereinafter provided, the deficiency shall be made up by selections made within six miles from said road *from land of the United States to which none of the aforesaid objections apply*.
>
> (Section 1.)

PROVISO NO. 14

H. R. 364, Doolittle's amendment of June 11, 1862 (37th Cong., 2d sess.).

This amendment to Northern Pacific Railroad bill set apart the proceeds of the sales of the alternate sections for twenty miles on each side of the road. The indemnity proviso was as follows:

> And in all cases where the United States may have disposed of said lands, or any part thereof, the deficiency may be made up from the sales of any of the odd-numbered sections of the *public lands within the distance of forty sections on either side of said road: Provided,* That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a *like quantity of unoccupied and unappropriated agricultural lands nearest to the line of said road, through said mineral lands,* may be selected in alternate sections.
>
> (Bill contained no iron and coal proviso.)

PROVISO NO. 15

H. R. 364, 37th Cong., 2d sess.

Upon consideration of this bill to aid in a Pacific Railway by the Senate, an amendment was proposed by Senator Doolittle, Cong. Globe, p. 2815, June 19, 1862.

It was provided in section 1 that mineral losses should be satisfied from unoccupied and unappropriated agricultural lands nearest the line of the road through the mineral lands, as follows:

> *Provided,* That all mineral lands be, and the same are hereby excluded from the operation of this act, and in lieu thereof a like

quantity of *unoccupied and unappropriated agricultural lands nearest to the line of the road, through said mineral lands,* may be selected in alternate sections.

PROVISO NO. 16

S. 360, Senator Doolittle, Public Lands Committee, June 20, 1862 (37th Cong., 2d sess.).

This bill to aid in the construction of the Northern Pacific Railroad set apart the proceeds of the sales of the alternate sections for twenty miles on each side of the road. The indemnity provision was as follows:

> And in all cases where the United States may have disposed of said lands, or any part thereof, the deficiency may be made up from the sales of any of the odd numbered sections of the *public lands within the distance of forty sections on either side of said road: Provided,* That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural lands nearest to the line of said road, through said mineral lands,* may be selected in alternate sections.
>
> **(Section 2.)**
>
> (Bill contained no iron and coal proviso.)

PROVISO NO. 17

H. R. 5, Mr. Stevens, Select Committee, December 14, 1863 (38th Cong., 1st sess.).

As reported February 15, 1864 (no changes in section 3):

The bill to aid in construction of the People's Pacific Railroad granted twenty and ten alternate,

odd-numbered sections on each side of road, but, whenever prior to the time the line of the road is definitely fixed—

> any of said sections or parts of sections shall have been sold or preempted, *other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior* * * * *Provided,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like *quantity of unoccupied and unappropriated agricultural lands nearest to the line* of said road may be selected.

(Bill contained no iron and coal proviso.)

PROVISO NO. 18

H. R. 483, By Mr. Stevens, May 23, 1864 (38th Cong., 1st sess.).

This was a bill granting lands to aid in construction of a railroad from Lake Superior to Puget Sound. The proviso excluding mineral lands from the grant and providing for lieu selections of agricultural lands was as follows:

> *Provided,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural land nearest to the line of said road* may be selected.

On consideration by the Senate (Cong. Globe 3290, June 27, 1864), the above proviso to section 3 was deleted.

PROVISO NO. 19

Conference Committee Report, July 1, 1864 (Cong. Globe, 38th Cong., 1st sess., 3459).

The committee on conference on the disagreement between the House and Senate upon amendments to H. R. 483, granting lands for the construction of a railroad from Lake Superior to Puget Sound, recommended: That the House recede from its disagreement to amendments 1–12, 14, 15, 17–23, and Senate Amendment 13, and that the Senate recede from its disagreement as to Senate Amendment No. 24 and agree with the following amendment:

> *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of *unoccupied and unappropriated agricultural lands,* in odd-numbered sections, nearest to the line of said road, and within fifty miles thereof, may be selected as above provided.

The recommendation was signed as follows:

J. R. DOOLITTLE,
ISA HARRIS,
J. W. NESMITH,
Managers on Part of the Senate.
THADDEUS STEVENS,
I. DONNELLEY,
Managers on the Part of the House.

APPENDIX B

[Senate Executive Document No. 78, 33rd Cong., 1st Session, 1855–59, Series No. 758–768]

TABLE OF LENGTHS, ETC.

Table showing the lengths, sums of ascents and descents, equated lengths, cost, &c., of the several routes explored for a railroad from the Mississippi to the Pacific. (For the grades, see the profiles accompanying the report.)

	Distance in straight line	Distance by proposed railroad route	Sum of ascents and descents	Length of level route of equal working expense	Comparative cost of different routes	Number of miles of route through arable land	No. of miles of route through lands generally uncultivable, arable soil being found in small areas	No. of square miles of sums of areas of largest bodies of arable land in uncultivable region	No. of miles at an elevation above 0, and less than 1,000 feet	No. of miles at an elevation greater than 1,000 and less than 2,000 feet	2,000 and 3,000	3,000 and 4,000	4,000 and 5,000	5,000 and 6,000	6,000 and 7,000	7,000 and 8,000	8,000 and 9,000	9,000 and 10,000	Summit of the highest pass on the route	
Route near 47th and 49th parallels:	*Miles*	*Miles*	*Feet*	*Miles*															*Feet*	
Route from St. Paul to Seattle.	1,410	2,025	19,100	2,387	[a]$140,871,000	535	1,490	[b] 1,000	631	580	720	130	97	28					6,044	Tunnel at elevat'n of 5,219 feet.
Route from St. Paul to Vancouver.	1,455	1,864	18,100	2,207	[a]130,781,000	374	1,490	[b] 1,000	470	580	720	130	97	28					6,044	Tunnel at elevat'n of 5,219 feet.
Route near 41° and 42°, via South Pass from Council Bluffs to Benicia.	1,410	2,032	29,120	2,583	116,095,000	632	1,400	[b] 1,100	180	170	210	160	580	285	270	107	20		8,373	
[c]38th and 39th—Westport to San Francisco by the Cooche-to-pa and Tah-ee-chay-pah Passes.	1,740	2,080	49,986	3,125		620	1,460	[b] 1,100	340	276	165	348	468	170	60	155	80	20	10,032	Tunnel at elevat'n of 9,540 feet.
38th and 39th—Westport to San Francisco by the Cooche-to-pa and Madelin Passes.	1,740	2,290	56,514	3,300		670	1,620	1,190	275	308	190	143	725	284	110	155	80	20	10,032	Tunnel at elevat'n of 9,540 feet.
35th—Fort Smith to San Pedro.	1,360	1,802	48,812	2,816	[d]160,210,265	416	1,476	2,300	305	347	200	185	100	305	235	95			7,472	
35th—Fort Smith to San Francisco.		2,174	50,670	3,137		648	1,530	2,300												
32d:																				
Fulton to San Pedro	1,400	1,618	32,784	2,239	68,970,000	408	1,210	2,300	485	300	100	170	503	60					5,717	
Fulton to San Francisco	1,620	2,039	42,008	2,834	93,120,000	759	1,282	2,300	700	410	160	205	504	60					5,717	

(Footnotes omitted)

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